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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 431

JOHN A. SAVAGE, *Petitioner*,

v.

IVAN HADLOCK, ET AL., *Respondents*.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

EUGENE N. MURPHY
211 C Street, N. W.
Washington, D. C.
Counsel for Petitioner.

WILLIAM A. GALLAGHER
1804 M Street, N. W.
Washington, D. C.
Of Counsel.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
PETITION FOR WRIT OF CERTIORARI	1
Conclusion	18
APPENDIX:	
Excerpts from Reporter's Transcript of ex parte Hearing of October 22, 1954	1a
Final Order of U. S. District Court, October 29, 1954	10a
Final Order of U. S. District Court February 11, 1937	17a
Judgment of Court of Appeals, June 6, 1958	26a

TABLE OF AUTHORITIES

CASES:

Chase v. U. S., 261 U.S. 833, (aff. 256 U.S. 1)	9, 10
Denny v. Bennett, 128 U.S. 488	8
Guth v. Texas, 155 Fed. (2) 563	8
Hammond v. Arkansas, 212 U.S. 322	13
Higgins v. California Prune and Apricot Growers, 3 Fed. (2) 896	9
Hill v. Wampler, 298 U.S. 463	8, 11, 12
Hovey v. Elliott, 167 U.S. 409	13, 14
Messinger v. Anderson, 225 U.S. 436	9
National Manufactures, etc., v. Whitman, 93 Fed. (2) 829	6
National Union of Marine Cooks, etc., v. Arnold, 348 U.S. 37	13
Radio Corporation of America v. Radio Engineering Laboratories, 293 U.S. 1, 9	6
Reynolds Spring Co. v. L. A. Young Industries, 101 Fed. (2) 259	10
Societe Internationale, etc., v. Brownell, —— U.S. ——	13
Sun Co. v. Vinton Petroleum Co., 248 Fed. 623, (Cert. Denied, 247 U.S. 5 4)	6

	Page
Taylor v. Morton, 67 U.S. 481	7
The Virginia, 60 U.S. 182, 19 How. (U.S.) 162	7
U. S. v. De Pachacho, 20 How. (U.S.) 261	8
U. S. v. Gomez, 64 U.S. 488, 489	8
Windsor v. McVeigh, 93 U.S. 274	14

STATUTE:

Title 28, United States Code, Section 1254	2

TEXT:

American Jurisprudence, Vol. 37, Sec. 34, page 516	11

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TO THE HONORABLE EARL WARREN, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, John A. Savage, respectfully shows:

No opinion was rendered by the Court of Appeals.

The judgment of the Court of Appeals was entered on June 6, 1958, and was dated the same day. (App. hereto, p. 25a.) Petitioner's motion for clarification of the judgment was denied June 30, 1958, Petitioner's motion for leave to file motion for rehearing was filed July 1, 1958, and was denied August 19, 1958.

By order of this Court, dated September 9, 1958, petitioner's time for filing petition for certiorari was extended to and including October 4, 1958, and his motion for a further extension of four days to and including October 8, 1958, was granted October 7, 1958.

It is believed that jurisdiction to review the aforesaid judgment of the Court of Appeals is conferred by Title 28, Section 1254, of the Code of Laws of the United States, as amended June 6, 1946, under the provisions of paragraph (1) as follows:

> "Cases in the Courts of Appeal may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any part in any civil case . . . ."

The questions presented for review are as follows:

1. Whether the District Court for the District of Columbia has jurisdictional power, after a defendant in a civil case has appeared and answered the complaint, and the cause is at issue, to conduct and *ex parte* hearing for the purpose of taking proofs from the plaintiffs; and to deny the defendant the right to testify, to produce witnesses, and to produce documentary evidence in support of the defenses set out in his answer.

2. Whether a judgment or decree entered upon the basis of such *ex parte* hearing is void for lack of jurisdiction because of denial of due process of law, if it deprives defendant of his property.

3. Whether such judgment or decree can validly be made the basis for subsequent proceedings brought for the purpose of enlarging and extending it; or of orders and judgments in such

subsequent proceedings which deprive defendant of his property.

In this case suit was filed in the District Court in 1951, (District Court No. 111-51, Court of Appeals Nos. 12-559, and 13,994, more than five years after the alleged cause of action arose. The petitioner was the defendant, and the respondents were the plaintiffs. The charge was fraud. The petitioner appeared and answered fully, and the case was at issue and ready for trial. Thereafter the District Court set the case for ex parte hearing to take "ex parte proof from the plaintiffs," and conducted such a hearing. In that hearing the petitioner was denied the right to testify, to produce witnesses and documents, in support of the defenses in his answer, as though he had never appeared and filed such answer. A final judgment, (Appendix hereto, p. 10a) and decree was entered by the District Court on October 29, 1954, based upon such hearing and upon a supposed default judgment against petitioner. No default judgment was ever entered against him, he was never in default. No order striking his answer was ever entered, nor any decree *proconfesso*. He was never ordered to produce evidence, never refused to produce evidence, and was never found to be in contempt of court for failure to do anything ordered by the Court. This decree took from petitioner two pieces of real estate, and gave a money judgment against him for $17,548.91.

From the aforesaid judgment and decree of October 29, 1954, petitioner noted his appeal, and attempted to prosecute it in forma pauperis. His attempt was abortive, and his appeal was dismissed. This was in case No. 12,559 in the Court of Appeals. The order

of dismissal was entered on March 22, 1955 (Rec. 123). In that appeal no transcript of record was filed, nor were any issues decided by the Court of Appeals.

On January 20, 1956, the appellees filed a second suit in the District Court (D. Ct. No. 254-56; Ct. of Appls. No. 13995), in which petitioner and his sister Eliza T. Savage, now deceased, were made defendants. This suit was a supplementary proceeding, brought to enforce rights claimed by appellees under the void decree of October 29, 1954, in the earlier suit. Petitioner and the co-defendant answered in separate answers, and, with other defenses, put in issue the validity of the October 29, 1954 order, asserting it to be void for want of due process. Upon motion of respondents, plaintiffs, the two suits were consolidated for trial, and trial was had. The final order and judgment of the District Court was entered on February 11, 1957, with findings of fact and conclusions of law. (Appendix hereto, p. 17a.) In it the Court found, "that the said defendant, John A. Savage had his day in Court so to speak in said Civil Action 111-51 and that his purported claims of unfair treatment by the Court . . . are without merit and substance and that the judgment so rendered by the Court on October 29, 1954, in said Cause No. 111-51 was and has been at all subsequent time valid and binding." The same order took from the petitioner and his sister three further pieces of real estate, and added $1,201.20 to the money judgment given in the earlier order, and appointed a trustee to sell the real estate to satisfy the two money judgments. (Appendix hereto, p. 17a.)

The petitioner appealed from this order, as did his sister. They applied to the District Court for leave to proceed in *forma pauperis*, which was denied (Tr.

of Record, 85), in an order which stated that the appeal was not in good faith, that no substantial question is involved, and that the defendants were not in poverty within the meaning of the statute. Application was made to the Court of Appeals for consolidation of the two cases on appeal, and for leave to proceed in *forma pauperis*. (R. 65.)

The application to consolidate was granted, and the petitioner and Eliza T. Savage were allowed to proceed on appeal without prepayment of costs (R. 108), but the appeal was limited by the Court, as follows:

> "the appeal, however, are limited to the following issues
>
> (1) Validity of the District Court order of July 28, 1954, and the judgment based thereon, *having regard to the action of this Court in dismissing the appeal therefrom;* (Emphasis added)
>
> (2) Standing of appellants to contest the validity of the above-mentioned order and judgment in this proceeding."

By the limitations of the above order, the Court of Appeals apparently undertook to limit its consideration of the appeal to the question of whether its dismissal of the abortive attempt to appeal in the first case established *res judicata*, and amounted to an affirmance of the Order of October 29, 1954; and did not intend to go into the question of the denial of due process raised by petitioner's appeal; and to consider the question of the right of the appellants to attack that judgment only in the light of the Court's dismissal of the first appeal, and not in the light of *due process*. The appeal was thus resolved into an

avoidance of petitioner's assertion that due process had been denied him; which was emphatically the heart of his cause. Whether the discretion confided by Title 28, Sec. 1915 to Courts of Appeal in dealing with applications *in forma pauperis* is sufficiently broad to authorize a procedure which departs from the accepted rules of appellate practice is questionable. The general rule is that:

> "Where the law gives a party an appeal, he has the right to demand the conscientious judgment of the appellate court on every question arising in the case." 3 Am. Jur. "Appeal & Error," Sec. 814.

And as announced by Judge Caroza in *Radio Corporation of America* v. *Radio Engineering Laboratories*, 293 U.S. 1, 9:

> "We know that an appeal in equity imports a broad power of revision." And in Keller v. Potomac Electric Power Company this Court said that in equity procedure . . . "an appeal brings up the whole record and the appellate is authorized to review the evidence and make such order or decree as the Court of first instance ought to have made."

And, because this was an appeal in equity the Circuit Court of Appeals should review the facts as well as the law and the review is a real review, and not a perfunctory approval. *National Manufactures and Stores Co.* v. *Whitman*, 93 Fed. (2d) 829. Such appeal brings the entire case before the Appellate Court for review; *Sun Co.* v. *Vinton Petroleum Co.*, 248 Fed. 623, Cert. Denied, 247 U.S. 514.

Petitioner believes that he was entitled to have a ruling from the Court of Appeals in this cause upon the question of due process of law.

But in any event, petitioner asserts that the dismissal of the appeal in Civil Action No. 111-51 (Appeal Case No. 12,559) was entered upon a preliminary proceeding, which came before the Court on the application of John A. Savage for leave to prosecute the appeal in *forma pauperis*. The records of that Court show that he first filed an application for an extension of time for filing the record. To this the appellees filed a motion to dismiss. This motion the Court ordered held in abeyance for thirty days. Appellant thereafter filed a petition for leave to proceed in *forma pauperis*. On March 12, 1955, the Court granted appellants' motion to dismiss, and dismissed the appeal. In the same order the Court said:

> "It is further ordered that Appellant's motion for a further extension of time to file the record be, and it is hereby denied, and that Appellant's petition for leave to prosecute his appeal in forma pauperis be, and it is hereby, dismissed as moot."

It is quite apparent that the Court of Appeals did not, at the time the order was entered, have before it the record in the case, and that the appeal was not under consideration upon the merits. With a case on the merits before the Court, the Court must affirm or reverse the lower Court. *Taylor* v. *Morton*, 67 U.S. 481. The dismissal of the appeal cannot be regarded as an affirmance.

It has been decided that the dismissal for failure to prosecute is not a final decision. *Taylor* v. *Morton*, 67 U.S. 481; *The Virginia*, 60 U.S. 182, 19 How. 162.

That allowance of a motion to docket and dismiss a cause on account of the failure of appellant to file the record within the time required is not an affirmance of the judgment below, but merely remits the case to be proceeded with as the court below shall think proper. *United States* v. *Gomez*, 64 U.S. 326; *United States* v. *DePachacho*, 20 How. 261. A decision upon a motion or summary application is not to be regarded in the light of *res judicata*, or as so far, conclusive upon the parties as to prevent their drawing the same matters into question again in a more regular form of action. *Denny* v. *Bennett*, 128 U.S. 488, 489; *Hill* v. *Wampler*, 298 U.S. 463. The latter case holds:

> "Finality within the doctrine of res judicata does not attach to every ruling upon law made by a judge upon the decision of a motion. Denny v. Bennett, 128 U.S. 488, 489; Riggs v. Pursell, 74 N.Y. 370, 387; American Surety Co v. Baldwin, 287 U.S. 156, 166. This is true though the ruling may have been pertinent or even necessary to the conclusion reached. In such cases finality will rarely be extended beyond the terms of the order, and applied to the supporting circumstances."

It is clear from the foregoing that the action of this Court in dismissing the appeal was not an affirmance, nor would it establish *res judicata* so that the appellant would be defeated by that ruling on another appeal.

It also is clear that no "law of the case" was made by that dismissal. In *Guth* v. *Texas*, 155 Fed. 2, 563, the Court said:

> "It may be urged by the defendant that we had once construed paragraph 5 of the amended complaint when it was before us on the first appeal as one for waste, and as such the plaintiff would

> have to allege that the defendant had burned and wasted the gas, gasoline, and petroleum distillates. *So we did*. . . . . We are not bound by our ruling on the pleadings on the first appeal, and may, indeed we must, under the extremely liberal rules of Federal Rules of Civil Procedure take any possible view of the facts which would entitle the plaintiff to relief. . . . Such view by us does not violate the 'law of the case' rule, which rule is, of course, not absolute. Messinger v. Anderson, 225 U.S. 438; Reynolds Spring Company v. L. A. Young Industries, 101 Fed. 2d 257, 259."

In *Messinger* v. *Anderson*, supra, the Supreme Court said:

> "In the absence of statute, the phrase, law of the case as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely express the practice of courts generally, to refuse to reopen what had been decided, not to limit their power. King v. West Virginia, 216 U.S. 92, 100; Remington v. Central, etc. R.R. Co., 198 U.S. 95, 99, 100; Great Western Tel. Co. v. Burnham, 162 U.S. 339."

An appellate court, by its decision does not preclude itself from doing justice between the parties, if on subsequent appeal it should be convinced that a former decision was erroneous *Chase* v. *United States*, 261 Fed. 833, decree affirmed, 256 U.S. 1.

The rule of the "law of the case" does not rigidly bind a court to its former decisions, but is only addressed to its good sense, and an appellate court may change its ruling, made in a prior appeal in the same case, to conform to a subsequent decision of the Supreme Court. *Higgins* v. *California Prune and Apricot Growers*, 3 Fed. 2d 896.

In *Reynolds Spring Co.* v. *L. A. Young Industries*, 101 Fed. 2d at page 259, the Court says:

> "It is a well-recognized rule that an appellate court on a second appeal may review and revise a conclusion reached on the first appeal, it becoming the law of the case only as to the lower court. Messinger v. Anderson, 225 U.S. 436, 444; Lawrence-Williams Co. v. Societe Enfants, etc., 52 Fed. 2d 853; United States v. Stevens, 64 Fed. 2d 853; Des Moines Term. Co. v. Des Moines Union Ry. Co., 52 Fed. 2d 616."

It seems well-established then, that even where an appellate court has fully heard a case on the merits, and explicitly decided those issues, the court may yet, if the case should come before it on a second appeal, reverse itself and do justice between the parties. *Chase* v. *United States*, 261 Fed. 833, decree affirmed, 256 U.S. 1.

To say that the Court of Appeals, by dismissing the first appeal in this litigation, under the circumstances then prevailing, had in legal effect affirmed the July 28, 1954, the October 29, 1954, decrees, (for if either doctrine, *res judicata* or *the law of the case*, compel the appellants to submit to those decrees, the effect insofar as they are concerned will be the same as an affirmance), would mean that the Court, by its refusal to permit the appeal to continue, accomplished the same result as an affirmance would accomplish.

Appellants urge upon the Court, that the statement of law set out below is a true guide for this court's action:

> "In applying the doctrine of res judicata to orders, there is a distinction to be noticed between those made upon motions respecting collateral

questions arising in the course of a trial and final orders affecting the substantial rights from which an appeal lies. . . . It is generally held that the doctrine does not apply to a decision on motion with the same strictness as to a judgment, and accordingly that on order made in a pending action on a motion involving merely a question of practice, or appealing to the discretion of the court is not an adjudication barring a subsequent or application on the same ground." *American Jurisprudence*, Vol. 37, page 516, Sec. 34; citing *Hill* v. *U. S.*, 298 U.S. 460; *American Sec. Co.* v. *Baldwin*, 287 U.S. 156; *Denny* v. *Bennett*, 128 U.S. 488, 489.

"The general rule is that a judgment which is void cannot be cured by subsequent proceedings. Such a judgment cannot be validated by citing the parties against whom it was rendered to show cause why it should not be declared valid; *or by affirmance of an appellate court, especially if such affirmance is put upon grounds not touching the validity of the judgment. It is also worthy to note that even the legislature may not ratify a void judgment so as to import validity to it.*" (Emphasis added.)

And this being the law, even an affirmance by that Court would not make the orders here discussed anything but void.

On this point, therefore, it is respectfully submitted that the action of the Court of Appeals in dismissing the appeal as aforesaid imparted no validity to the proceedings in the District Court, and that the doctrines of *res judicata* and the law of the case do not bind this court nor the appellants.

"Finality within the doctrine of res judicata does not attach to every ruling upon law made by

a judge upon the decision of a motion. Denny v. Bennett, 128 U.S. 488, 489; Riggs v. Pursell, 74 N.Y. 370, 378; American Surety Co. v. Baldwin, 287 U.S. 156, 166. This is true though the ruling may have been pertinent or even necessary to the conclusion reached. In such cases finality will rarely be extended beyond the terms of the order, and applied to the supporting circumstances." Hill v. Wampler, 298 U.S. 463.

Upon the above law, if the order of October 29, 1954, was the result of denying petitioner due process of law in the hearing of October 22, 1954, any subsequent proceeding to enforce or amplify, or extend the former order would be a void as the order itself; and this rule would apply in this cause to the second suit which comprises Court of Appeals Case No. 13-995 (No. 254-56, in the District Court). Res judicata does not apply.

The petitioner represents to the Court that the Reporter's Transcript of the *ex parte* hearing of October 22, 1954, is the crux of the case. He says that it was in that hearing that he was deprived of due process of law. The full transcript is before this Court, ; and the portions of it to which he would call the Court's attention are set out in the appendix hereto, in conformity with Rule 23 (f) of this Court. He submits that that record demonstrates that he was deprived of due process, better than any argument or statement he could make.

The Court will see, from the Reporter's Transcript of the proceedings of October 22, 1954, that the District Court was proceeding upon the false assumption that

an order had been entered striking petitioner's answer and other pleadings from the record, and that a default judgment had been entered against him which made it unnecessary for the appellees to prove the essential allegations of their complaint. The order of October 29, 1954, itself recites "default judgment having been entered on July 28, 1954 . . ." (J. App. 16.) The order of July 28, 1954, (J. App. 4c) however fails to confirm this. It is a mere interim order, giving petitioner time within which to deposit costs with the Court Auditor in the sum of $437.50. It neither declares a default, strikes petitioner's answer, nor renders a default judgment against him. To have done so at that time would have been premature; and no such orders were ever entered thereafter. But even if they had been, they would have ben void, under *Hovey* v. *Elliott*. Such orders would formalize the withdrawal of due process, not justify it.

Petitioner submits to the Court that his case is within the rule laid down by this Court in *Hovey* v. *Elliott*, 167 U.S., 409. That case, too, involved an order of the same District Court below. Petitioner relies upon the law as there announced; and *Hammond* v. *Arkansas*, 212 U.S. 322, *National Union of Marine Cooks & Stewards*, 248 U.S. 37, and *Societe Internationale, etc.*, v. *Brownell*, . . . U.S. . . ., do not affect its application to this case; In *National Union* v. *Marine Cooks, etc.*, the complaining party had a full hearing in the District Court: in the other cases the complaining parties had failed or refused to comply with an order of court to produce evidence, which clearly distinguishes them.

In *Hovey* v. *Elliott, supra,* this Court said:

"'In *McVeigh* v. *United States,* 11 Wall. 259 the court, through Mr. Justice Swayne said: (p. 267)
"'In our judgment, the District Court committed a serious error in ordering the claim and answer of the respondent to be stricken from the files. As we are unanimous on this conclusion, our opinion will be confined to that subject. The order in effect denied the respondent a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that forum . . . The liability and the right are inseparable. *A different result would be a blot upon our jurisprudence and civilization. We cannot hesitate or doubt on the subject. It would be contrary to the first principles of the social compact and of the right administration of justice.*'."

"And quoting with approval this language, in *Winsor* v. *McVeigh,* 93 U.S. 274, the court, speaking through Mr. Justice Field, again said (pp. 277, 278):"

"'The principle stated in this terse language lies at the foundation of all well-ordered systems of jurisprudence. Wherever one is assailed in his person or his property, *there he may defend,* for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all nations. A sentence of a court pronounced against a party without hearing him, or giving him an opportunity to be heard, is not a judicial determination of his right, *and is not entitled to respect in any other tribunal.*

"'That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his rights, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the sub-

ject matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to a notice at all, and the sham deceptive proceeding had better be omitted altogether. It would be like saying to a party, appear and you shall be heard; and when he has appeared, saying, your appearance shall not be recognized, and you shall not be heard. In the present case, the District court not only in effect said this but immediately *added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a more arbitrary edict, clothed in the form of a judicial sentence.*'"

"This case language but expresses the most elementary conception of the judicial function . . ."

The Supreme Court, in applying these principles to the case before it said: (p. 417)

"Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn a citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be said that the judicial department, the source and fountain of justice itself, has the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution. If such power obtains, then the judicial department of the government sitting to uphold

and enforce the Constitution is the only one possessing power to disregard it. If such authority exists then in consequence of their establishment, to compel obedience to law and to enforce justice, courts possess the right to inflict the very wrongs which they were created to prevent."

"And that the judicial department of the government is, in the nature of things, necessarily governed in the exercise of its functions by the rule of due process of law, is well illustrated by another observation of Judge Cooley, immediately following the language just quoted, saying:

" 'The definition here given is apt and suitable as applied to judicial proceedings, which cannot be valid unless they 'proceed upon inquiry' and 'render judgment only after trial.' "

"The necessary effect of the judgment of the Supreme Court of the District of Columbia was to decree that a portion of the award made in favor of the defendants, in other words, his property, belonged to the complainants in the cause. The decree therefore awarded the property of the defendant to the complainants upon the hypothesis that by contract the defendant had transferred the right in or to this property to the complainant. If the court had power to do this by denying the right to be heard to the defendant, *what plainer illustration could there be of taking property of one and giving it to another without hearing or without process of law.*

* * * * *

"The right which was here denied" (i.e. in the Hovey v. Elliott case,) "by rejecting the answer and taking the bill for confessed because of the contempt *involved an essential element of due process of law*, and our opinion is therefore exclusively confined to the case before us.

* * * * *

"It being therefore clear that *the Supreme Court of the District of Columbia did not possess the power to disregard an answer which was in all respects sufficient and had been regularly filed,* and to ignore the proof taken in its support, *the only question remaining is whether a judgment based upon the exercise of such an assumed power is void for want of jurisdiction, and may therefore be collaterally attacked.* It cannot be doubted that where a judgment is rendered without the issuance and service of a summons against a party who did not enter an appearance, the *court rendering it is without jurisdiction to do so, and it can be assailed as void whenever presented as a muniment of right against another.* Looking at the substance and not the form of the decree in the case of Hovey v. McDonald, upon which the rights of plaintiff in error depend, *it is plain that judgment was substantially one without a hearing,* for of what efficacy or avail was the summons to appear when the court which issued the summons rendered its judgment upon the theory that the summons was inefficacious, and that the defendant had no right either to appear or to be heard in his defense? As was said by this Court in Adams v. Postal Telegraph Cable Co., 155 U.S. 689, 698: *'The substance and not the shadow determines the validity of the exercise of the power.'*"

* * * * *

"... *we rest our decision on the want of power in the courts of the District of Columbia to suppress an answer of parties defendant, and after so doing to render a decree pro confesso as in case of default for want of an answer* ..." (Pp. 446-447) (All emphasis added)

CONCLUSION

Petitioner avers that after the entry of the void judgment of October 29, 1954, all subsequent proceedings in the District Court below, and the Judgment of June 6, 1958 in the Court of Appeals were likewise void, being but a continuation of the denial of due process. Such judgments cannot be cured by affirmation, but only by undoing the wrong and granting to petitioner the right to make his defenses.

And petitioner says that as a result of the unjust and oppressive *ex parte* hearing of October 22, 1954, in the District Court below, and since the entry of the void order of October 29, 1954, by that Court, he has been harassed, and impoverished, his credit ruined, two pieces of his property taken from him and sold, and three other pieces ordered sold: and that he is without any recourse to right these wrongs except the writ of certiorari of this Court.

Respectfully submitted,

EUGENE X. MURPHY
211 C Street, N. W.
Washington, D. C.
Counsel for Petitioner,

WILLIAM A. GALLAGHER
1804 M Street, N. W.
Washington, D. C.
Of Counsel.

APPENDIX

APPENDIX

Excerpts From Reporter's Transcript of Ex Parte Hearing of Oct. 22, 1954

Page 5:

"MR. DONNELLY: We have a judgment signed by Judge Tamm on July 28, 1954 and on the 12th Judge Holtzoff set this matter down for a hearing before your Honor this morning for the taking of ex parte proof to be offered by the Plaintiff whom I represent.

"THE COURT: That is all that is before me, isn't it, Mr. Savage?

"MR. SAVAGE: Pardon?

"THE COURT: I say, according to the order which Mr. Donnelly has referred to me, bearing date of October 12, 1954—

"MR. SAVAGE: Yes, I know, that is all before your Honor right now. But I say—

"THE COURT: And it is before me, according to the order, for the purpose of taking ex parte proof from the plaintiff and for such other proceedings as the case may require.

Page 8:

"THE COURT: Now, Mr. Savage, I don't want to cut you off but the only thing I apparently have before me this morning is compliance with an order of October 12—

"MR. SAVAGE: Yes, I quite understand that but—

"THE COURT: Well, maybe we had better just proceed with what is before me." * * *

"MR. SAVAGES . . . Now there is no authority for ex parte proceedings after the party has appeared." * * *

Page 9:

"MR. SAVAGE: . . . Now the ex parte proof—now I am going to say something—about, it will take a moment longer here—

"THE COURT: You are not helping me, Mr. Savage." • • •

Page 17:

"THE COURT: (To Mr. Donnelly) In other words, there had been a default in the case?

"MR. DONNELLY: Yes, sir, your Honor.

"THE COURT: And there being a default, you were moving and Judge Holtzoff granted your motion for a hearing in connection with the default?

"MR. DONNELLY: That is correct, sir."

During a colloquy between Counsel for plaintiffs, the defendant, and the Court, relating to a motion pending in the case, the following ensued:

Page 23:

"MR. SAVAGE: . . . I had paid them $2500 for their interest in the house and she wrote and wanted to borrow $100. Her husband was sick. I immediately telegraphed her $100 and she said that I can hold this $100 out of the jewelry.

I could keep the jewelry as a guarantee for payment of the hundred dollars.

When it came to—

"THE COURT: Now, Mr. Savage, that isn't before me.

"MR. SAVAGE: But he is accusing me—

"THE COURT: I am not going to hear any more of it, sir—

"MR. SAVAGE: —of swindling—

"THE COURT: —because I am not going to decide this case on what he said about a letter and I am not going to decide it on your rebuttal of the claim. I can't." • • •

Page 24:

"THE COURT: . . . And we will now, sir, proceed with the taking of testimony or proof in conformity with the order of October 12, 1954.

"MR. SAVAGE: Now, your Honor, I think I have stated in this motion here that there is no authority for—

"THE COURT: Well, now, let me say this, Mr. Savage. You have told me that, sir, and the record adequately supports your claim and we have a court of appeals, sir, and you can proceed there if you are properly advised.

"MR. SAVAGE: But I want to say this, that this is going to be a hearing. There are two kinds of defaults, one where the party has failed to appear—

"THE COURT: I have ruled, sir. You are protected on the record, sir, and we are going to proceed to the matter which is before me now.

"MR. SAVAGE: Now, just a minute, your Honor.

"THE COURT: I am not going to go any further into it, Mr. Savage, and I hope you demean yourself so it won't be necessary for me to do something else.

"MR. SAVAGE: I hope—

"THE COURT: Yes, it is necessary that you do it. Now we are going to proceed with the matter at hand, namely to comply with the order of October 12, sir.

Page 25:

"MR. SAVAGE: I see. Well, I shall object right now to going any further.

"THE COURT: All right, sir." • • •

Page 26:

"MR. SAVAGE: Now understand, your Honor, this is ex parte. I have a right to question it.

"THE COURT: I am not sure of that, sir." • • •

Page 28:

"THE COURT: Let me ask you, Mr. Donnelly, what are you expecting to show at this time, sir?

"MR. DONNELLY: If your Honor please—

"THE COURT: The amount of damages, is it?

"MR. DONNELLY: Yes, sir.

But I have done it this way for this reason: Even though this is a default situation, I believe that you, as a chancellor in order to exercise your equitable powers, which will include the appointment of a trustee with directions to convey these two houses back to the plaintiffs, that your Honor would want to be advised with respect to the evidence in the case.

"THE COURT: As a matter of law, sir, if there has been a default and you are asking for damages and what else? Affirmative action by the Court?

"MR. DONNELLY: It is two equitable remedies that we are asking for. The first is an accounting which does not involve arithmetic. That is out of the case but it is an accounting.

Secondly, we ask that your Honor set aside two deeds and appoint a trustee to reconvey the property to the plaintiffs, two equitable remedies.

"THE COURT: Now, Mr. Savage says he has got a right to be heard; that he hasn't been in default. Is that true?

Page 29:

"MR. DONNELLY: I take this position, your Honor: The Assignment Commissioner thought that he should not even be given notice of this hearing before.

But I looked it up and found a case in the 8th Circuit which says that when you have this situation that we have that he still is entitled to be present.

Now of the extent to which he might participate, I am not advised.

"THE COURT: All right, sir. I am having difficulty,

though, finding what I really need here now, Mr. Donnelly, in this case. There has been a default?

"MR. DONNELLY: Yes, sir.

THE COURT: Which says that your complaint has, is to be treated as proved?

"MR. DONNELLY: Yes, your Honor.

"THE COURT: Now, on the basis of that, you ask for two things, one, an appointment of a trustee and 2, for an accounting which isn't in the nature of a money accounting?

"MR. DONNELLY: It is not in the nature of a lot of arithmetic figures which I want you to refer to the Auditor. What we have done with the accounting, sir, is this:

Page 30:

We have boiled it down to one item and that is the fair market value of the rooming house business owned by the decedent which he appropriated on the date of her death.

So all we need is one witness to testify for ten minutes with respect to that one figure. We want that accounting, the accounting of the fair market value of that business as of the date she died but it doesn't take a lot of arithmetic. Just one witness that says it was worth $3500 on the day she died.

"THE COURT: Has Mr. Savage seen this brief, sir?

"MR. DONNELLY: No, your Honor. I will be happy to hand him a copy here at this time which I now do in open court.

"MR. SAVAGE: Very well.

(Mr. Donnelly handed a copy of the brief to Mr. Savage.)

"MR. SAVAGE: How many pages are there, sir?

"MR. DONNELLY: 37 pages.

"THE COURT: I am still at a loss to follow you, Mr. Donnelly. If no proof is required, why do I need your brief?

"MR. DONNELLY: Because this is an equitable matter and your Honor is sitting as a chancellor and you must exer-

cise your conscience and I think that the Court is in a better position—

"THE COURT: Well, I am going to exercise it on what? On the brief or on testimony or on what?

Page 31:

"MR. DONNELLY: Well, my thought would be that your Honor would hear about two witnesses briefly, and examine the documentary evidence, all of which is identified in the brief.

"THE COURT: In other words, your case would be the two witnesses plus the documents—

"MR. DONNELLY: Yes, sir.

"THE COURT: —which are encompassed in this memoranda?

Page 149:

"MR. SAVAGE: I want to save my rights going along, your Honor. It may seem a little unreasonable what I am going to ask, but under the rule it is required that upon rule 55 [illegible] that where a party is brought in as I have been brought in here they have been entitled to a hearing.

You have given us a hearing. But I want to produce a witness. They have put on men here, experts that testified that this property was worth $13,000 and I brought witnesses up here when we were ready to go to a trial. I brought two witnesses here who were ready to testify that they weren't worth over $9500, you see. Now I haven't had any opportunity to. I want you to continue this until I can bring them in.

"THE COURT: You mean you have no witnesses here?

"MR. SAVAGE: Oh, I will have them, I will—

"THE COURT: No, have you them here? Got them here? No, I don't think we will continue it then." . . .

Page 150:

"THE COURT: So I have two things before me, sir. You are saying that you have no witnesses here which could deal with the question of the damages in the case either as to the price or as to the value of the business.[1]

"MR. SAVAGE: Well, I can take the stand myself as far as that goes.

"THE COURT: I didn't ask you what you could do. You say that you have no witnesses here for either of those purposes and 2) you are saying that notwithstanding the default in the case, that you are entitled to a jury trial.

"MR. SAVAGE: Yes. I would like to testify about the value."

Page 154:

"MR. SAVAGE: Oh, yes; well, I am going to say that they, that now on this evidence they claim there weren't any joint deeds.

Now I came to court here.

"THE COURT: I have no evidence before me of any joint deeds, either, sir.

"MR. SAVAGE: Well, I came to court when I knew I was going to have a trial, I thought I was going to have a trial, we came to court before Judge Kirkland and I was down here on ex parte brought in here on ex parte proceeding, I didn't even know I was going to be heard in fact, the Assignment Commissioner told me I wouldn't be heard.

I have the evidence in 15 lawsuits where a joint suit that Mrs. deMontis and I had together over the years wherein she stated and several times under oath, that we were the joint owners of that realty and the business. And we had a joint business private license.

Now, we have here—

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[1] This shows clearly, that the Court was thinking only in terms of mitigation of damages; that the issue of fraud was foreclosed by the alleged "default" order.

"THE COURT: Now, you came down here this morning insisting on being heard.

"MR. SAVAGE: Pardon?

Page 155:

"THE COURT: You came down here insisting on being heard and you have been accorded a hearing which frankly I am not sure that you are entitled to but you have had it anyway.

Now, therefore, having come, insisting on that, I think I have a right to assume, expect you to have with you such things as you deem necessary for your purposes.

Page 160:

"MR. SAVAGE: Well, now, your Honor said that I didn't bring any evidence in here to prove the lost joint deeds.

Page 161:

"THE COURT: I didn't hear you.

"MR. SAVAGE: You said I didn't bring any evidence to prove the lost joint deeds.

"THE COURT: As a matter of fact, I am not sure that you are entitled to do it.

"MR. SAVAGE: I have abundant—I am not entitled then to put up a defense, is that it?

"THE COURT: I don't think you had—you and I had better debate that. I understand from the record in this case that you have been accorded such right and having failed therein this court has effected a default which leaves for determination at this time the matters which we have today considered, sir. Now what has gone before is a matter of record in the court and would not be for my purpose to recapitulate. The record speaks for itself so I am moving from what has transpired today, sir.

Which is, I think, all that I can do." • • •

Page 162:

"MR. SAVAGE: Well, your Honor, I want an opportunity to present a motion for rehearing on the grounds—wait a minute—on the ground of surprise, that I didn't know that we were going to have a hearing here and didn't come with my evidence on the joint deeds and my evidence as to the values, see. And if I had known, going to have a hearing I was notified this was going to be an ex parte proceeding, and I moved to strike it off because I didn't think they had any right to have an ex parte hearing.

Now you have heard me but you haven't had my witnesses here, either, the experts as to the values or the evidence as to the joint lost, joint deeds and I think I should have an opportunity, your Honor, to present those things. I shouldn't have judgment taken against me this way.

I don't think so. Now there is a statute of limitations to consider too, as well.

Page 163:

"THE COURT: I don't know what you understand by a default judgment, Mr. Savage. If there be such a thing as a default judgment, it should mean something, if it means that you get a default judgment, then* you do the same thing whether it be a default, as if you haven't, well then we have a useless step in the law, haven't we?

I don't think you and I need debate that, though. I have made the findings to the best of my ability. I will take an order to those findings and judgment and thereon if you are so advised, you may file any motion that the law permits.

"MR. SAVAGE: Well, I shall file a motion, your Honor, to save the record for reopening and rehearing which I say on the grounds of surprise, I didn't know what was going to be brought up here and I want to have an opportunity of bringing my witnesses in to testify as to these values and bring in the evidence on the joint deeds." • • •

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* and?

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 111-51

IVAN K. HADLOCK, et al., *Plaintiffs*

vs.

JOHN A. SAVAGE, individually and as administrator of the Estate of Myrtle deMontis, deceased, *Defendant*

Order Carrying Into Effect Final Judgment of July 28, 1954

This matter having come on to be heard before the Court pursuant to the Order entered October 12, 1954 which set the cause down for the purpose of taking ex parte proof from the plaintiffs and for such other and further proceedings as the nature of the cause may require, default judgment against defendant having been entered on July 28, 1954, and the plaintiffs and the defendant having each been given due and ample notice of said facts, upon consideration of the pleadings herein, the evidence offered by the plaintiffs, the evidence offered by the defendant, and after full hearing of plaintiffs and of defendant, and the defendant having had full and ample opportunity and notice to bring such witnesses as he may have desired to call and to adduce such evidence as the defendant may have desired to adduce, it is by the Court this 29th day of October, 1954 FOUND:

That the plaintiffs are the sole heirs at law and next of kin of Myrtle deMontis, who died on April 19, 1945, and were on said date;

That her estate is covered by Administration No. 65508 of the Probate Court of this Court;

That on the date of decedent's death, April 19, 1945, Mrs. Carmita L. Helmbold, her sister and one of her two sole

heirs at law and next of kin and a plaintiff herein, was an invalid and helpless, and still is, and was then and still is in dire financial circumstances;

That Defendant Savage fraudulently and dishonestly misrepresented to plaintiffs that the estate was insolvent, when in truth and in fact it was not;

That the plaintiffs are and were the sole heirs at law, and also the sole next of kin, and therefore that the sole heirs at law and next of kin are and were identical;

That Defendant Savage unlawfully and fraudulently misrepresented to plaintiffs that decedent's rooming-house business was his own and was not the property of the estate of decedent;

That Defendant Savage fraudulently and dishonestly misrepresented to plaintiffs that the two pieces of real estate owned by decedent on the date of her death, 1346 and 1348 Fairmont Street, N. W., Washington, D. C., were subject to joint deeds permitting survivorship to him as a joint tenant, and misrepresented that such joint deeds had not been recorded and had been lost, when in truth and in fact there were no such joint deeds;

That Defendant Savage fraudulently and dishonestly misrepresented the fair market value of said two pieces of real estate to the plaintiffs at the assessed value thereof, $8281 with respect to one, and $8241 with respect to the other, when in truth and in fact the fair market value of each said piece of real estate on April 19, 1945, the date of decedent's death, was not less than $13,000, each;

That Defendant Savage fraudulently and dishonestly convinced plaintiffs that they would not receive anything whatever from the estate unless they executed to him quitclaim deeds for their respective interests in the realty and instruments assigning to him their rights in the estate;

That Defendant Savage fraudulently and dishonestly induced plaintiffs to execute quit-claim deeds, conveying to him their respective interests in the two pieces of real estate, 1346 and 1348 Fairmont Street, N. W., Washington, D. C., and also to execute void assignments of their rights in the estate of decedent, for $2,500 to each of them;

That Defendant Savage on April 19, 1945, and continually from then to this date, has been fully aware of the helpless situation of the co-plaintiff, Mrs. Carmita L. Helmbold;

That Defendant Savage fraudulently and dishonestly induced the plaintiffs to consent to his appointment as administrator of said estate under special bond;

That Defendant Savage perpetrated a fraud on this Court by applying under oath for letters of administration in that he was not qualified under law to serve as administrator because he had been convicted of an infamous crime, to wit, conviction of fifteen counts of mail fraud for which he served a part of his sentence in the Leavenworth Penitentiary;

That Defendant Savage fraudulently and dishonestly misrepresented himself to the plaintiffs, the sole heirs at law and next of kin of decedent, as a creditor of the estate, and misrepresented that he thereby had some rights with respect to appointment as administrator, when in truth and in fact he was not a creditor of the estate but he was indebted to the estate and owed the estate substantial money;

That as a material part of his fraud, Defendant Savage misrepresented to plaintiffs that if he were appointed as administrator under special bond, he would expedite settlement of the estate and make distribution to them possible in less than one year;

That immediately after his appointment as administrator under special bond, Defendant Savage fraudulently misrepresented to plaintiffs that settlement of the estate and dis-

tribution thereof to them could not be made until after twelve years had elapsed from the date of his qualification as administrator;

That Defendant Savage fraudulently and dishonestly misrepresented to plaintiffs that the realty owned by decedent, namely 1346 and 1348 Fairmont Street, N. W., Washington, D. C., was under his control as administrator, when in truth and in fact it was not;

That pursuant to said fraud, Defendant Savage paid $2,500 to plaintiff Helmbold and only $1000 to plaintiff Hadlock;

That Defendant Savage filed an inheritance tax return with the District of Columbia Government in August, 1946, declaring the share of plaintiff Helmbold to be $4968.78 from the estate and the share of plaintiff Hadlock to be $4968.77 from the estate, and Defendant Savage paid tax thereon;

That Defendant Savage at no time informed the plaintiffs, or either of them, that he had recognized their shares to be that which he reported to the District of Columbia Government in said inheritance tax return, or in any other amount;

That plaintiffs, in the hearing before this Court, did not press for an accounting of decedent's personal effects, and offered no evidence in support of count one of their complaint filed herein;

That Defendant Savage fraudulently and dishonestly misappropriated to his own use and ownership, decedent's rooming-house business;

That Defendant Savage from the date of decedent's death, April 19, 1945, to the present, unlawfully withheld from plaintiffs the title and possession of the two pieces of real estate, 1346 and 1348 Fairmont Street, N. W., Washington, D. C.;

That the fair market value of decedent's rooming-house business on the date of her death, April 19, 1945, was not less than $3,500;

That the fair rental value of each said house from April 19, 1945, to the present, was not less than $125 per month per house, or $28,500 for one hundred fourteen (114) months from April 19, 1945, to the present;

That the plaintiffs have been fraudulently and dishonestly defrauded by Defendant Savage of $32,000 from April 19, 1945 to the present;

That the moneys due and owing by Defendant Savage to plaintiffs amount to $32,000;

That the plaintiffs in the hearing before this Court tendered to Defendant Savage the following moneys as an offset against their rights:

(a) $2,500, representing money paid by Defendant Savage to Plaintiff Helmbold;

(b) $1,000 paid by Defendant Savage to Plaintiff Hadlock;

(c) $2,952.36, representing the amount of real estate taxes paid by Defendant Savage to the District of Columbia Government for the properties since April 19, 1945;

(d) $4,225.66, representing payments made by Defendant Savage on the mortgage on 1346 Fairmont Street and insurance thereon since April 19, 1945;

(e) $3,773.13, representing net payments made by Defendant Savage on the mortgage on 1348 Fairmont Street and insurance thereon, since April 19, 1945. (The payments so made total $5,148.13. Savage, however, refinanced this property on February 20, 1947, and pocketed $1,375. This amount is subtracted from $5,148.13.);

That the plaintiffs tendered in total, in the hearing, to Defendant Savage the amount of $14,451.09, as an offset against their right to $32,000.00 from Defendant Savage; and

That the plaintiffs' said judgment of July 28, 1954, against Defendant Savage is in the amount of $17,548.91, insofar as the accounting is concerned.

It Is Concluded by the Court:

That the two alleged deeds executed by the plaintiffs in September 1946 (by Plaintiff Helmbold) and in January 1947 (by Plaintiff Hadlock et ux) to 1346 and 1348 Fairmont Street, N. W., Washington, D. C. (Lots numbered 33 and 34 in Joseph A. Blundon's subdivision of lot numbered ten (10) Block numbered Thirty-one (31) "Columbia Heights," as per plat recorded in the office of the Surveyor for the District of Columbia in Liber County 11 at folio 51, also known for taxation purposes as Lots 33 and 34, Square 2861) are, and were, void and are set aside and held for naught; and

That the plaintiffs are entitled to a judgment against Defendant Savage in the amount of $17,548.91.

Now, Therefore, It Is Ordered by the Court Under the Judgment of July 28, 1954:

That the said deeds to 1346 and 1348 Fairmont Street, N. W., Washington, D. C. (Lots numbered 33 and 34 in Joseph A. Blundon's subdivision of lot numbered ten (10) Block numbered Thirty-one (31) "Columbia Heights," as per plat recorded in the office of the Surveyor for the District of Columbia in Liber County 11 at folio 51, also known for taxation purposes as Lots 33 and 34, Square 2861) be, and they hereby are, vacated, held for naught, and set aside, and all right, title and interest, in fee simple, in and to said real properties is found to be in the plaintiffs herein, Ivan K. Hadlock and Carmita L. Helmbold, as tenants in

common, as of the death of Myrtle deMontis on April 19, 1945, and continually from that date to the present; and

That plaintiffs be, and hereby are awarded judgment against Defendant Savage, in the amount of $17,548.91.

RICHMOND B. KEECH
Richmond B. Keech
Judge

CERTIFICATE OF SERVICE

This will certify that copy of the foregoing order was had on defendant by mailing a copy thereof postage prepaid to defendant John A. Savage, 1303 Fairmont Street, N. W., Washington, D. C., this 25th day of October, 1954.

JOHN J. DONNELLY
John J. Donnelly
Attorney for Plaintiffs

A TRUE COPY

TEST:

HARRY M. NULL,
Clerk,

By CHAS. H. WALSH
Deputy Clerk.

(Seal)

Filed Feb. 11, 1957

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 111-51

IVAN K. HADLOCK, ET AL., *Plaintiffs*,

v.

JOHN A. SAVAGE, ETC., *Defendant*.

Civil Action No. 254-56

IVAN K. HADLOCK, ET AL., *Plaintiffs*,

v.

JOHN A. SAVAGE, ETC., and ELIZA T. SAVAGE, *Defendants*.

Findings of Fact, Conclusions of Law, and Decree

On the 23rd day of January, A.D. 1957, the above styled causes of action came on to be heard before the Court pursuant to the consent order entered on December 14, 1956, consolidating for hearing the issues raised in the two above styled and numbered causes. The plaintiffs appeared by their counsel, John J. Donnelly and Margaret H. Earley. The defendants, John A. Savage and Eliza T. Savage, appeared in person and by their counsel, William A. Gallagher. The Court, after hearing all of the evidence adduced by both the plaintiffs and defendants and after hearing the statements and arguments of counsel and being fully advised in the premises by clear and convincing proof, finds:

In Civil Action No. 111-51, the Judge who heard and tried said cause did on October 22, 1954, announce in open Court that he would enter a decree in equity in said Civil Cause No. 111-51, holding and finding that the plaintiffs in that cause; namely, Ivan K. Hadlock and Carmita L. Helmbold, were the sole and only heirs of Myrtle de Montis, deceased; that at the time of the death of said decedent, Myrtle de Montis, she was the owner of the real estate

and premises located and situated at 1346 and 1348 Fairmont Street, N.W., Washington, D. C., being more particularly described as Lots No. 33 and 34 in Joseph A. Blundon's subdivision of Lot No. 10, Block No. 31 "Columbia Heights" according to the plat recorded in the Office of the Surveyors for the District of Columbia in Liber County 11 at Folio 51; said properties also being known for taxation purposes as Lots 33 and 34, Square 2861. That subsequent to the death of the said Myrtle de Montis, the defendant John A. Savage had procured deeds to the real estate and premises above described from the said plaintiffs Ivan K. Hadlock and Carmita L. Helmbold, but that said deeds were fraudulent and void and of no force and effect because the said John A. Savage had procured said deeds by fraud practiced upon said plaintiffs.

The Court further finds that on said date of October 22, 1954, in said Civil Action No. 111-51, that the Court announced in open Court that the Court would likewise enter a decree requiring payment by the defendant John A. Savage to said plaintiffs in the sum of $17,548.91.

The Court further finds that on October 22, 1954, at the time the Court made the announcement and pronouncement that it would enter a judgment and decree in favor of the plaintiffs and against the defendant John A. Savage cancelling deeds and for money judgment, that the defendant herein in Civil Action 254-56, Eliza T. Savage, was present; that she is the sister of the defendant John A. Savage who was the sole defendant in Civil Action No. 111-51; that she was present in the courtroom in 1954 throughout the hearing of Civil Action No. 111-51 and knew and understood the announcement made by the Court on October 22, 1954, as to the character of the judgment and decree that would be entered against her brother John A. Savage.

The Court further finds that on Monday morning, October 25, 1954, at approximately 9 o'clock A.M., Eliza T.

Savage, one of the defendants in Civil Action No. 254-56, appeared in person and presented for record at the Office of the Recorder of Deeds for the District of Columbia, a purported deed bearing the date of March 31, 1949, executed by John A Savage as grantor to Eliza T. Savage as grantee, purporting to convey to the defendant Eliza T. Savage an undivided joint interest and ownership in the real estate and premises located and situated at 1346 and 1348 Fairmont Street, N.W., Washington, D. C., and, that at the same time, date and place, the said Eliza T. Savage also presented for record in the Office of the Recorder of Deeds of the District of Columbia, deeds to three pieces of real property owned by the defendant John A. Savage, which deeds purported to convey from the defendant John A. Savage as grantor to Eliza T. Savage, grantee, a joint, equal and undivided right, title and interest by entirety in each of said parcels of real estate more particularly described as follows:—

Instrument 37278 in Liber 10295 at Folio 433, Lot 30 in Square 2860, also known as 1303 Fairmont Street, N.W., Washington, D. C.

Instrument 37279 in Liber 10295 at Folio 435, Lot 45, Square 2860, also known as 2722 Thirteenth Street, N.W., Washington, D. C.

Instrument 37280 in Liber 10295 at Folio 437, Lot 77, Square 2854, also known as 1327 Harvard Street, N.W., Washington, D. C.

The Court further finds that the defendants John A. Savage and Eliza T. Savage, as brother and sister, have for many years maintained a close and confidential relationship, particularly with regard to the business affairs of each other; that the deed purporting to convey the premises located at 1346 and 1348 Fairmont Street, N.W., Washington, D. C., from the defendant John A. Savage to the defendant Eliza T. Savage and presented for record

by the said Eliza T. Savage on October 25, 1954, was without consideration and if the said John A. Savage had ever at any time had any interest in said two properties lastly above described, said interest had long since ceased to exist; that prior to and on April 19, 1945, these said properties were owned by and vested in Myrtle de Montis and that upon her death they vested in her sole and only heirs, Ivan K. Hadlock and Carmita L. Helmbold; all of which had been found by the decree of this Court entered in October, 1954, in Civil Action No. 111-51.

This Court further finds that the purported deed bearing date of March 31, 1949 between John A. Savage, grantor, and Eliza T. Savage, grantee, purporting to convey to the defendant, Eliza T. Savage, an undivided joint ownership in the premises located at 1346 and 1348 Fairmont Street, N.W., Washington, D. C., and which was presented for record by the defendant Eliza T. Savage on October 25, 1954, was for the purpose of clouding the title to said premises and to obstruct the decree of this Court announced on October 22, 1954.

The Court further finds that the purported deeds presented for record by the defendant Eliza T. Savage on October 25, 1954, purporting to convey the property at 1303 Fairmont Street, 2722 Thirteenth Street, and 1327 Harvard Street, all in northwest Washington, D. C., and hereinbefore more specifically described as to metes and bounds, were and are fraudulent and void insofar as the plaintiffs Ivan K. Hadlock and Carmita L. Helmbold are concerned.

That the said defendant Eliza T. Savage, who presented said deeds lastly above described for record on October 25, 1954, was present and knew that on October 22, 1954, a money judgment had been rendered against her brother John A. Savage in favor of the plaintiffs in Civil Cause No. 111-51 for the sum of $17,548.91, and this Court finds that the filing of said deeds for record by the said defend-

ant Eliza T. Savage under the circumstances and at the time and place above described, was for the sole purpose of attempting to protect the real estate and premises of the defendant John A. Savage from levy and execution of the judgment that had been rendered against him on October 22, 1954, in Case 111-51.

That there was no consideration passing from the said Eliza T. Savage to the said John A. Savage, her brother, and that said deeds are invalid and void as against a judgment creditor of the said John A. Savage and particularly these plaintiffs because of the knowledge and intent of the said defendants John A. Savage and Eliza T. Savage.

The Court further finds that plaintiffs herein were entitled to the possession of the real estate and premises located at 1346 and 1348 Fairmont Street, N.W., Washington, D. C. as of October 29, 1954, by reason of the decree entered in Civil Action 111-51, on that date; that while the said John A. Savage did appeal from said decree on October 29, 1954, he did not post a supersedeas bond and that he refused to surrender to the plaintiffs the possession of said premises at 1346 and 1348 Fairmont Street, N.W.

The Court further finds that it was not until May 5, 1955, pursuant to a writ of assistance issued by this Court on April 8, 1955, that the plaintiffs came into possession of the said two properties located on Fairmont Street, N.W.; that the withholding of possession of said premises at 1346 and 1348 Fairmont Street, N.W., from the plaintiffs, entitles the plaintiffs to be paid the fair and reasonable rental value on said properties from the time they were wrongfully withheld by the defendant John A. Savage, which the Court finds was for a period of approximately five and one-fifth months, that the fair and reasonable rental value of said properties was not less than One Hundred

Dollars per month per house, or a total of Two Hundred Dollars per month.

That under the pleadings herein and the evidence offered, the plaintiffs are entitled to a further and additional judgment against the defendant John A. Savage in the sum of $1,040.00.

The Court further finds that during the period that the defendant John A. Savage wrongfully withheld from the plaintiffs possession of said properties at 1346 and 1348 Fairmont Street, N.W., he used water on said premises furnished by the District of Columbia Government in the amount of $161.20 and failed to pay the District of Columbia for said water; that when the plaintiffs finally secured possession of said premises they were compelled to pay to the District of Columbia Government the sum of $161.20 for said water used by the defendant John A. Savage; that therefore the plaintiffs are entitled to recover from the said John A. Savage an additional sum of $161.20, or a total for rental and the water bill herein described of $1,201.20.

The Court further finds that the decree entered in Civil Action No. 111-51 for the payment of the sum of $17,548.91, plus interest and costs, to the plaintiffs by the defendant John A. Savage remains wholly unsatisfied and that said sum of $17,548.91, together with interest and costs, and the further sum of $1,201.20, awarded herein to the plaintiffs against the defendant John A. Savage, are valid and subsisting liens against the interests of defendant John A. Savage in real property in the District of Columbia.

The Court further finds that the said defendant John A. Savage had his day in Court so to speak in said Civil Action No. 111-51 and that his purported claims of unfair treatment by the Court who heard and determined said Cause No. 111-51 are without merit and substance and that the judgment so rendered by the Court on October 29,

1954, in said Cause No. 111-51 was and has been at all subsequent times valid and binding.

IT IS THEREFORE BY THE COURT CONCLUDED:

That the three purported deeds presented for record by the defendant Eliza T. Savage to the office of the Recorder of Deeds for the District of Columbia on October 25, 1954, and recorded as Instruments 37278, 37279 and 37280 in Liber 10295 at Folios 433, 435 and 437, respectively, purporting to convey from the defendant John A. Savage to the defendant Eliza T. Savage, an equal, joint and undivided right, title and interest by the entirety in 1303 Fairmont Street, N.W. (being Lot 30 in Square 2860), 2722 Thirteenth Street, N.W. (being Lot 45 in Square 2860), and 1327 Harvard Street, N.W. (being Lot 77 in Square 2854), all in the District of Columbia, were and are fraudulent and void as to the plaintiffs herein as judgment creditors of the defendant John A. Savage.

That the plaintiffs are entitled to a decree in Civil Action No. 111-51 for the payment by defendant of $1,201.20, in addition to the sum of $17,548.91, provided in the decree entered in said cause on October 29, 1954.

That the plaintiffs herein are entitled to a judgment foreclosing the judgment lien created by the decree of this Court entered October 29, 1954, in Civil Action No. 111-51 and by this decree and are further entitled to full assistance of this Court in enforcing their right in the satisfaction of said decrees.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT:

That the said deeds to 1303 Fairmont Street, N.W., Washington, D. C. (being Lot 30, Square 2860), 2722 Thirteenth Street, N.W., Washington, D. C. (being Lot 45, Square 2860), and 1327 Harvard Street, N.W., Washington, D. C. (being Lot 77, Square 2854) and recorded among

the Land Records of the District of Columbia as Instruments numbered 37278, 37279 and 37280 in Liber 10295 at Folios 433, 435 and 437 respectively, be, and they hereby are, vacated, held for naught, and set aside insofar as the rights of the plaintiffs herein are concerned.

That plaintiffs be, and they hereby are, awarded in Civil Action No. 111-51 a decree for the payment of $1,201.20 by defendant John A. Savage in addition to $17,548.91 awarded to plaintiffs against defendant John A. Savage by decree entered in Civil Action No. 111-51 on October 29, 1954.

The plaintiffs' lien on 1303 Fairmont Street, N.W. (Lot 30, Square 2860), 2722 Thirteenth Street, N.W. (Lot 45, Square 2860) and 1327 Harvard Street, N.W. (Lot 77, Square 2854) all in Washington, District of Columbia, be, and it is hereby foreclosed as provided by law and directed to be sold to the extent necessary to satisfy the amount of $17,548.91 with interest from October 29, 1954, and the further amount of $1,201.20 with interest from this date, and the costs in both Civil Action 111-51 and Civil Action 254-56.

That Herman Miller, a member of the Bar of this Court, be, and he hereby is, appointed Trustee to sell, at public or private sale, and to convey the equitable interest of defendant John A. Savage in 1303 Fairmont Street, N.W., Washington, D. C., (Lot 30 Square 2860), 2722 Thirteenth Street, N.W., Washington, D. C., (Lot 45, Square 2860) and 1327 Harvard Streets, N.W., Washington, D. C. (Lot 77, Square 2854) and to distribute the proceeds in the manner required by law so as to satisfy the decrees in equity entered in Civil Action No. 111-51 for the payment by defendant John A. Savage to plaintiffs of $17,548.91 plus interest from October 29, 1954 and of $1,201.20 plus interest from this date, and costs in both Civil Action 111-51 and Civil Action 254-56; PROVIDED that before entering upon his duties as such trustee, said Herman Miller

post an undertaking in the penal sum of $20,000.00 with surety approved by the Court, conditioned upon the faithful performance of his duties as such trustee.

ROSS RIZLEY
Ross Rizley
United States District Judge

February 8th, 1957

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958

Nos. 13,994 & 13,995

District Court Civil Nos. 111-51 & 254-56

JOHN A. SAVAGE and ELIZA T. SAVAGE, *Appellants*,

v.

IVAN K. HADLOCK, ET AL., *Appellees*.

Appeals from the United States District Court for the District of Columbia.

Before: EDGERTON, Chief Judge, BAZELON and BURGER, Circuit Judges.

Judgment

These causes came on for argument on the transcript of record and the appeals having been limited by our order granting the appeal in forma pauperis to the following issues:

(1) Validity of the District Court order of July 28, 1954, and the judgment based thereon, having regard to the action of this Court in dismissing the appeal taken therefrom;

(2) Standing of the appellants to contest the validity of the above-mentioned order and judgment in this proceeding.

It is ORDERED by the Court that the judgment of the District Court appealed from be, and it is hereby, affirmed.

It is FURTHER ORDERED by the Court that appellees herein recover from appellants their taxable costs on these appeals and have execution therefor.

PER CURIAM.

Dated: June 6, 1958

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 431

JOHN A. SAVAGE, *Petitioner*,

v.

IVAN K. HAPLOCK, ET AL., *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. DONNELLY
1028 Connecticut Avenue
Washington 6, D. C.
Attorney for Respondents

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

Page

Brief of Respondents in Opposition to Petition for Writ of Certiorari 1

The Present Posture of the Litigation 2

The Petition Is Without Merit and Should be Denied.. 3

The Order of July 28, 1954 Is Valid in Every Sense 7

The Judgment of October 29, 1954 Is Valid in Every Respect 11

Petitioner Has No Standing to Contest Order of July 28, 1954 and Judgment of October 29, 1954 in This Proceeding 11

Limitation of the Questions on Appeal in Forma Pauperis Made by the Court Below Was Entirely Proper 17

Conclusion 18

TABLE OF AUTHORITIES

Cases:

Ackerman v. United States, 340 U.S. 193, 71 S. Ct. 209 (1950) 13

Adkins v. E. I. duPont de Nemours & Co., 335 U.S. 331, 69 S. Ct. 85 (1948) 17

Brown v. County of Buena Vista, 95 U.S. 157, 159, 24 L. Ed. 422 14

Cromelin v. Markwalter, 181 F. 2d 948, 14 Fed. Rules Serv. 60b. 35, 1950 16

Eichberg v. U.S. Shipping Board, etc., 51 App. D.C. 44, 273 Fed. 886, 49 W.I.L.R. 418 (1921) 4

Fraser v. Doing, 76 U.S. App. D.C. 111, 130 F. 2d 617, 70 W.I.L.R. 856 (1942) 14

Gilmore v. Hinman, 89 U.S. App. D.C. 165, 191 F. 2d 675, 79 W.I.L.R. 1172 (1951) 15

Hammond Packing Co. v. Arkansas, 212 U.S. 322, 29 S. Ct. 370, 53 L. Ed. 530, 15 Ann. Cas. 645 (1909) 9

Page

Hovey v. Elliott, 167 U.S. 409, 17 S. Ct. 841 (1897) 7, 8, 9, 11
National Union of Marine Cooks & Stewards v. Arnold, 348 U.S. 37, 75 S. Ct. 92 (1954) 7, 9
Rothschild & Co. v. Marshall, 51 F. 2d 897, C.A. 9, 1931 14
Societe Internationale, etc., v. Brownell, 96 U.S. App. D.C. 232, 225 F. 2d 532 (1955), cert. den. 350 U.S. 937, 76 S. Ct. 302, rehrg. den. 350 U.S. 976, 76 S. Ct. 430 ..... 7, 9

RULES:

Rule 15, U.S. District Court for the District of Columbia 10
Rule 37(b)(2)(iii), and Rule 37(d), F.R. Civ. P. 8
Rule 60(b), F.R. Civ. P. 15, 16

IN THE

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JOHN A. SAVAGE, *Petitioner*,

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IVAN K. HADLOCK, Et Al., *Respondents*.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

At the outset, respondents state to the Court that the questions posed by petitioner at pages 2-3 of his brief are not based upon the record, nor upon the action of the Court of Appeals nor the District Court. The premises stated in the first question are contrary to the record, and the question is therefore fatally defective. The second and third questions, predicated as they are upon the first question, therefore do not present proper questions for consideration in this petition.

The position of petitioner is utterly devoid of merit, and his petition to this Court is interposed solely for further delay.

THE PRESENT POSTURE OF THE LITIGATION

Petitioner's brief makes reference to three different appeal numbers in the United States Court of Appeals for the District of Columbia (Nos. 12,559, 13,994 and 13,995). Respondents feel that this Court will be assisted if a brief statement is made of the source and nature of these three appeals, and of the present posture of the litigation.

Appeal No. 12,559 was taken from the final judgment of the District Court entered in Civil Action No. 111-51 on October 29, 1954 against petitioner, John A. Savage, individually and as administrator under special bond of the Estate of Myrtle deMontis, deceased. He was and is the only defendant in Civil Action No. 111-51. He noted an appeal from this judgment (Appeal No. 12,559), and this appeal was dismissed by the Court of Appeals on March 22, 1955 on his failure to perfect it. He did not petition certiorari in this Court, and the mandate of the Court of Appeals was filed in the District Court on April 25, 1955. The District Court, in turn, entered its judgment on the mandate on April 28, 1955. (Record, p. 31.)

Appeal No. 13,995 was from the final judgment entered by the District Court on February 8, 1957 in Civil Action No. 254-56 against John A. Savage (the petitioner herein) and his sister, Eliza T. Savage. This appeal was rendered completely moot by the death of Eliza T. Savage on March 16, 1958. She is completely out of the litigation for all purposes. The Court will note that the pending Petition for Writ of Certiorari is made solely by John A. Savage.

Appeal No. 13,994 is the only appellate cause now pending. It is from a supplemental judgment entered

by the District Court on February 8, 1957, solely against John A. Savage (the petitioner herein) in Civil Action No. 111-51. On June 6, 1958, the Court of Appeals affirmed the judgment of February 8, 1957, per curiam.

Procedurally, there is one further action on the part of petitioner which has significance. On October 29, 1956 (which is a date between the dismissal of his appeal in No. 12,559 by the Court of Appeals on March 22, 1955, and the entry of the supplemental judgment February 8, 1957), petitioner filed an extensive Motion to Strike and Vacate Judgment of October 29, 1954 in Civil Action No. 111-51 (Record, pp. 38-48). This was long after his present attorney, William A. Gallagher, Esq., had entered his appearance in Civil Action No. 111-51 on January 20, 1956 (Record, p. 33). The District Court overruled this motion on November 2, 1956 (Record, p. 48). Petitioner did not note an appeal from this denial.

Therefore, the posture of the litigation on the petition for certiorari is simply this: Petitioner is seeking to attack the judgment of October 29, 1954, by reaching back behind the dismissal of his appeal therefrom (Appeal No. 12,559) and behind his subsequent failure to appeal from the denial of his subsequent motion to vacate, whereas the only surviving issue is the supplemental judgment of February 8, 1957 (Appeal No. 13,994) which is primarily in aid of execution on the judgment of October 29, 1954.

THE PETITION IS WITHOUT MERIT AND SHOULD BE DENIED

Respondents believe that a forthright statement of the history of this litigation is all that is necessary to demonstrate that the petition is without merit, and should be denied.

The decedent, Myrtle deMontis, who was not related to petitioner, died on April 19, 1945. (Respondents are her sole heirs at law and next of kin.) Petitioner promptly took over her estate and accomplished his appointment as administrator under special bond by means of fraudulent representations to respondents. Thereafter, petitioner compounded his fraud in many other ways for the purpose of defrauding respondents out of their rightful shares, which he succeeded in accomplishing. (These facts are fully related in the judgment of October 29, 1954, Record, pp. 16-21.)

Petitioner's fraud was not discovered, or uncovered, by respondents until 1950. They promptly brought suit against petitioner in Civil Action No. 111-51 in January 1951, including prayers for an accounting.

On February 9, 1954 the District Court referred the cause to the Auditor of the Court (Record, p. 1). Neither side objected to the reference, "which may be treated as equivalent to consent." Eichberg v. U. S. Shipping Board, etc., 273 Fed. 886, 51 App. D. C. 44. Under an appropriate rule of the District Court, the Auditor required a deposit for the expenses of the reference to which petitioner consented, or agreed to (Record, pp. 3, 4, 4a, 4b). In any event petitioner informed the District Court that his counsel "did not object to the auditor's ruling" (Record, p. 4b, para. 4). Respondents promptly deposited their share with the Auditor. Petitioner failed to do so, and his failure was called to the attention of the District Court in the Auditor's Preliminary Report (Record, p. 1). The District Court considered the preliminary report, petitioner's sworn objections thereto, various affidavits and motions filed with respect to it, and heard argument in open court. This resulted in the Court's

order of July 28, 1954 which struck petitioner's answer and all pleadings and entered judgment against him, unless he within five days made a deposit with the Auditor. (Record, p. 4e.)

Petitioner failed to make the deposit, although clearly able to do so. On the fifth day he handed to the Auditor's office a check in the required amount, but accompanied it with the condition that he would sue both the District Judge and the Auditor in the Municipal Court "for recovery of the extorted money, plus punative (sic) damages" unless the money was returned to him within fifteen days (Record, p. 4f). The question of whether he had complied was placed squarely before the District Court by respondents' motion of September 15, 1954 (Record, pp. 4d, 4e, 4f, 4g) which was opposed by petitioner both in writing and by argument in open court, following which the District Court set the cause down for ex parte proof before a nonjury court and for such other and further proceedings as the nature of the case might require (Record, p. 5).

The hearing was held on October 22, 1954 before District Judge Keech. The hearing took up the entire day. Respondent Ivan K. Hadlock testified in extenso, followed by two other witnesses. Respondent Carmita L. Helmbold was not able to be present since she was a helpless paralytic, confined to her home in California. Respondents introduced fifty-one (51) exhibits to prove their case, the bulk of which were letters written by petitioner, himself. The transcript of the hearing is 163 pages long. This transcript has been physically filed in this Court. The excerpts therefrom which petitioner has printed at the outset of his "appendix" at the back of his brief are taken from

context and are misleading. Neither this transcript, nor the excerpts, were contained in the printed record in the Court of Appeals. Petitioner seeks to justify his inclusion of the excerpts in his appendix by Rule 23(f) of this Court, which, to the contrary, does *not* authorize any such inclusion, since the record was printed in the Court of Appeals, and petitioner has filed nine copies of this record in this Court.

The learned District Judge (Richmond B. Keech) carefully and conscientiously considered the evidence and the record, before signing his extensive findings, conclusions and judgment of October 29, 1954 (Record, pp. 16-21). He only did so after considering "Defendant's Objections to Proposed Order of Judgment for Plaintiffs" (Record, pp. 5-16). At the outset of his judgment, the District Judge stated that he had considered "the pleadings herein, the evidence offered by the plaintiffs, the evidence offered by the defendant, and after full hearing of plaintiffs and of defendant, and the defendant having had full and ample opportunity and notice to bring such witnesses as he may have desired to call and to adduce such evidence as the defendant may have desired to adduce" (Record, pp. 16-17). It is grossly and manifestly unfair to this District Judge for petitioner in phrasing his questions to this Court to say that he was denied "the right to testify, to produce witnesses, and to produce documentary evidence in support of the defenses set out in his answer." (Petitioner's Brief, page 2, question 1.) The record shows that, to the contrary, he was given a full hearing, fully satisfying due process of law. The District Judge stated unequivocally (page 155 of the transcript; page 8a of Appendix to Petitioner's Brief): "You came down here insisting on being

heard and you have been accorded a hearing which frankly I am not sure that you are entitled to but you have had it anyway."

The further proceedings which culminated in the supplemental judgment of February 8, 1957 (Record, pp. 56-63) were made necessary only because of petitioner's further fraud on the Court and on respondents. At the end of the day on Friday, October 22, 1954, District Judge Keech had announced from the bench that he would enter judgment in favor of respondents and against petitioner, and he directed that findings, conclusions and judgment be drafted and submitted to him. Petitioner, and his now deceased sister, Eliza T. Savage, heard this. On the next succeeding business day, Monday, October 25, 1954, at nine o'clock in the morning, she put on record fraudulent deeds to several pieces of real property, in which she was the fraudulent grantee. (These facts are contained in the supplemental judgment, Record, pp. 56-63.)

The Order of July 28, 1954 Is Valid in Every Sense

Petitioner relies on the doctrine of Hovey v. Elliott, 167 U. S. 409, 17 S. Ct. 841 (1897). Respondents say that this doctrine has no application because the facts in Hovey v. Elliott were entirely different. Rather the applicable law is found in National Union of Marine Cooks & Stewards v. Arnold, 348 U. S. 37, 75 S. Ct. 92 (1954) which discusses and distinguishes Hovey v. Elliott, and in Societe Internationale, etc., v. Brownell, 96 U. S. App. D. C. 232, 225 F. 2d 532 (1955), cert. den. 350 U. S. 937, 76 S. Ct. 302, rehrg. den. 350 U. S. 976, 76 S. Ct. 430, wherein the U. S. Court of Appeals for the District of Columbia Circuit recognized that "a court has inherent power to dis-

miss a suit, stay a trial or impose other limitations on the right to proceed with trial when it is established a party plaintiff has failed to comply with order of the court issued pursuant to its rules." This Court's statement in the National Union case makes this rule equally applicable to a party defendant.

In Hovey v. Elliott the trial court entered an order requiring the defendants to "pay over to the registry of the court" the sum of $49,297.50, which had been paid them by the receiver, Riggs & Co., a District of Columbia bank, representing the full market value of bonds sold by the receiver to the defendants. When the defendants failed to pay the money into the registry of the court, a series of proceedings ensued which were in name and nature contempt proceedings. These culminated in the court's striking their answer and entering a decree pro confesso against them, *without hearing*. This Court rendered an extensive discourse on the law of contempt from the earliest days, and struck down the trial court's decree as depriving the defendants of their property "without any hearing whatever;" and therefore without due process of law, as a punishment for contempt.

In the pending litigation, contempt is not involved, nor was it involved in the District Court. The only issue there was the inherent power of the trial court to enforce its rules. This Court has had occasion, many times since Hovey v. Elliott (1897), to consider the narrow limitations of the doctrine there announced, and has sanctioned and authorized the course taken by the District Court. Rules 37 (b) (2) (iii) and 37 (d), F. R. Civ. P., are excellent examples. The note of the Advisory Committee following Rule 37 states that the cited provisions of Rule 37 "are in accord with

Hammond Packing Co. v. Arkansas, 212 U. S. 322, 29 S. Ct. 370, 57 L. Ed. 530, 15 Ann. Cas. 645 (1909) which distinguishes between the justifiable use of such measures as a means of compelling the production of evidence, and their unjustifiable use, as in Hovey v. Elliott, 167 U. S. 409, 17 S. Ct. 841, 42 L. Ed. 215 (1897), for the mere purpose of punishing for contempt."

But this Court has gone further, saying in the National Union case, supra, in footnote 5, as follows:

> 5. The deprivation of a litigant's right to present a defense has been upheld, not as punishment for contempt as prohibited in Hovey v. Elliott, supra, but rather as a result of the litigant's failure to produce evidence, *his violation of a rule of procedure*, or other action justifying a judgment of default against him. (Citing cases). (Emphasis supplied.)

The following year (1955) the Court of Appeals for the District of Columbia Circuit did not hesitate to apply the philosophy of the National Union case, saying in Societe Internationale, supra, as follows:

> We agree with Chief Judge Laws that the power to dismiss is not dependent upon the terms of Rule 37; that is to say, we think it unnecessary to find a refusal within the meaning of that Rule. As he said:
>
> "* * * apart from dismissal by authority of specific rule of court or statute, a court has inherent power to dismiss a suit, stay a trial or impose other limitations on the right to proceed with trial when it is established a party plaintiff has *failed to comply with order of the court issued pursuant to its rules.* * * * If this were not so, a court would be powerless to enforce its rules and a liti-

gant might ignore them with abandon. * * *" (111 F. Supp. at page 447.) (Emphasis supplied.)

This Court, as noted above, denied certiorari and rehearing in this cited case, leaving standing intact the decision of the Court of Appeals. While the offending litigant in this cited case was a party plaintiff, the same judicial philosophy unquestionably is applicable to a party defendant under the holding of this Court in the National Union case a year earlier.

In the case at bar, the Auditor of the District Court after hearing issued an order pursuant to Local Rule 15. His order was consented to, or at the very least acquiesced in, by petitioner. The District Court in its order of July 28, 1954 confirmed the Auditor's order, and provided a means of enforcing it; otherwise the court would have been powerless to enforce its rules and petitioner could ignore them with abandon. Petitioner was not without lawful remedy; he could have applied to the Court of Appeals for leave to file a petition for writ of mandamus, or he could have brought this question before the Court of Appeals by appeal in the regular manner. He did neither. (He noted an appeal, but it was dismissed when he failed to perfect it.)

What petitioner did instead was to threaten the District Court as a condition to purported compliance with the Court's order. Was the District Court powerless to enforce its rules and petitioner entitled to ignore them with abandon? Particularly in light of his consent to the reference to the Auditor (by failure to object), and in light of his acquiescence in the Auditor's order as he himself admitted under oath (Record, p. 4b, para. 4)? The District Court did no more than

enforce its order entered pursuant to its rules, and the order of July 28, 1954 was valid in every respect.

The Judgment of October 29, 1954 Is Valid in Every Respect

District Judge Keech's judgment of October 29, 1954 was based on a full hearing accorded to petitioner. He had due and ample notice of the hearing, was present throughout, and had every opportunity to offer evidence which he did.

Here again the complete inapplicability of Hovey v. Elliott is apparent. In that case there was no hearing of any kind whatever; in the case at bar petitioner had ample notice of the hearing and participated fully therein. District Judge Keech acted in the fullest sense as a chancellor in the exercise of his equity powers. He was fully and extensively advised, as his judgment of October 29, 1954 demonstrates (Record, pp. 16-21). There is no question whatever that petitioner fully understood the nature and extent of the hearing as his lengthy objections to Judge Keech's proposed judgment show (Record, pp. 5-16). He moved for a new trial and argued the motion which was denied by District Judge Keech on November 16, 1954 (Record, p. 22). In due course he noted a timely appeal (No. 12,559) from the judgment; this appeal was dismissed in March 1955 since he failed to perfect it.

Petitioner Has No Standing to Contest Order of July 28, 1954 and Judgment of October 29, 1954 in This Proceeding

Petitioner has no standing to contest the validity of the order and the judgment in this proceeding.

After the District Court entered its order of April 28, 1955 on the mandate of the Court of Appeals dated

April 25, 1955 (Record, p. 31), the U. S. Marshal executed a writ of assistance issued by the District Court and in so doing placed in the possession of respondents two houses which were promptly sold by respondents to purchasers for value (Record, pp. 25-28). Respondent Carmita L. Helmbold had died in the interim between the judgment of October 29, 1954 and the dismissal of petitioner's appeal in No. 12,559 in March 1955, having passed away on December 2, 1954 (Record, p. 50). Many months later, on January 20, 1956, respondents filed a new action, Civil Action No. 254-56, asking the court to vacate and set aside as fraudulent to them deeds to three other houses, resulting in the judgment of February 8, 1957, and Appeal No. 13,995 which is moot by virtue of the death on March 16, 1958 of petitioner's sister, Eliza T. Savage, who was petitioner's fraudulent joint grantee.

On October 29, 1956, petitioner sought to strike and vacate the judgment of October 29, 1954, filing a lengthy motion for this purpose (Record, pp. 38-48). This was considered and overruled by District Judge Keech on November 2, 1956 (Record, p. 48). Petitioner failed to appeal from this order. The final hearing held by District Judge Rizley did not take place until January 23, 1957 (Record, p. 56) which was long after the time for petitioner to note an appeal from District Judge Keech's order of November 2, 1956 had expired. When District Judge Rizley, then, heard the several motions of respondents (Record, pp. 48-50, 51-55) in Civil Action No. 111-51 to enforce the judgment of October 29, 1954, petitioner had foreclosed himself from any further attack on the order of July 28, 1954 and the judgment of October 29, 1954—he had had the matter before the Court of Ap-

peals on his appeal in No. 12,559 which was dismissed in March 1955, and the following year before District Judge Keech on November 2, 1956. It is no wonder that District Judge Rizley in his decree of February 8, 1957 was moved to say:

> The Court further finds that the said defendant John A. Savage had his day in Court so to speak in said Civil Action No. 111-51 and that his purported claims of unfair treatment by the Court who heard the determined said Cause No. 111-51 are without merit and substance and that the judgment so rendered by the Court on October 29, 1954, in said Cause No. 111-51 was and has been at all subsequent times valid and binding. (Record, p. 61 at 275.)

In so saying, District Judge Rizley was repeating what the record showed to be very clear.

Prior to the adoption of the Federal Rules of Civil procedure on September 16, 1938, a litigant could attack the validity of a subsisting judgment by a bill of review, and of course the new Rules contain a similar type of remedy in Rule 60 (b). But under neither the old practice could, nor under the new Rule 60 (b) can, a litigant repeatedly challenge a judgment and not pursue his challenge to ultimate disposition. This was stated forcefully by this Court in Ackermann v. United States, 340 U. S. 193, 71 S. Ct. 209 (1950), as follows:

> There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.

Petitioner had made two separate and distinct challenges to the order of July 28, 1954 and the judgment of October 29, 1954 long prior to District Judge Riz-

ley's hearing on January 23, 1957. His challenges so made were "free, calculated, deliberate choices."

The Court of Appeals for the District of Columbia Circuit had earlier in 1942 expressed the same view in Fraser v. Doing, 76 U. S. App. D. C. 111, 130 F. 2d 617, saying emphatically:

> There is no more reason now than in earlier years to encourage litigants, by its (Rule 56(e)) use, to "drag out litigation endlessly, or to furnish a field for the unnecessary expenditure of money in costs and solicitors' fees."

In considering a bill of review filed by a litigant, the Court said further:

> So far as the record reveals—and it is a record made by appellant for his own purposes—he failed to avail himself of his opportunity to challenge the jurisdiction of trial court either in that court, or on appeal to this court.

And the same Court in the footnote (no. 21) to this statement quoted language from Rothschild & Co. v. Marshall, 51 F. 2d 897, C. A. 9, 1931, which more fully from the Rothschild case is as follows:

> To relieve against a judgment on the ground of accident or mistake, if it appears at all in a case like the one before us, it must be shown that the complaining party was without fault or negligence. A court is without power to grant relief if it appears that the party alleged to have been aggrieved could have, with proper diligence, prevented the mistake complained of. "Laches, as well as positive fault, is a bar to such relief." Brown v. County of Buena Vista, 95 U. S. 157, 159, 24 L. Ed. 422.

In the case at bar, if any mistake had been committed by the District Court in its order of July 28, 1954 or in its judgment of October 29, 1954, petitioner had every opportunity to prevent a continuation of such a mistake by perfecting his appeal in No. 12,559, or later by appealing from District Judge Keech's order of November 2, 1956. But there was no mistake in either the order or the judgment, and if there were, the laches of petitioner estops him from contesting either one in this proceeding.

A motion under Rule 60 (b) for relief from a judgment must be filed within a reasonable time. A reasonable time is necessarily a very short and limited period of time in circumstances such as those in this case, because, at every stage of the proceedings, petitioner was fully advised. He chose not to perfect his appeal in No. 12,559, and he chose not to appeal from District Judge Keech's order of November 2, 1956. Now he contends that he has standing in this proceeding to challenge the judgment of October 29, 1954 from which he had his right of appeal which he abandoned. In other words, he says he has a right to revive his appeal in No. 12,559 by substituting the order of District Judge Rizley dated February 8, 1957 for District Judge Keech's judgment of October 29, 1954, knowing that by his continued fraudulent conduct he forced respondents to obtain District Judge Rizley's order of February 8, 1957 in order to be fully made whole. He is estopped by his own conduct from so contending.

The Court of Appeals for the District of Columbia Circuit considered the concept of a "reasonable time" and Rule 60 (b) in Gilmore v. Hinman, 89 U. S. App. D. C. 165, 191 F. 2d 675 (1951). Appellant in that

case had noted but failed to perfect an appeal, which was accordingly dismissed. The following year (1950) appellant filed a motion to revoke the reference to the Auditor and set aside the judgment. The motion was denied, and appellant appealed on the ground that the trial court lacked authority to make the reference to the Auditor. The Court of Appeals affirmed per curiam, holding that sixteen months was not a reasonable time and that a motion of this sort cannot be used as a substitute for an appeal. And in the case at bar, Appeal No. 13,994, the time involved is over twenty-seven months (between District Judge Keech's judgment of October 29, 1954, and District Judge Rizley's order of February 8, 1957).

The Fifth Circuit Court of Appeals, in a case somewhat analogous to the case at bar, rejected the appellant's contentions under Rule 60 (b), holding that time is the essence of a motion for relief under this rule, Cromelin v. Markwalter, 181 F. 2d 948, 14 Fed. Rules Serv. 60b.35, (1950). Appellant in June 1949 had petitioned the court to rescind all prior proceedings and orders made in the cause since September 1947 when he himself had initiated the bankruptcy proceeding. The court said:

> In the first place, they were not made in a reasonable time, and this is of the essence of a motion for relief under rule 60 (b) on the ground claimed in the petitions that the orders were void. The petitions were not filed until more than a year after the sales had been made, the money paid, and the property delivered, though all of the proceedings now complained of had been taken with the full knowledge of appellant and, as to some of them, an appeal had been perfected and then abandoned.

Petitioner has had the fullest consideration not only by the District Court, but as well by the Court of Appeals, throughout the seven years that Civil Action No. 111-51 has been dragging in litigation, at all times and at every step with his full knowledge.

Limitation of the Questions on Appeal in Forma Pauperis Made by the Court Below Was Entirely Proper

In the petition (pages 5-7), petitioner challenges the action of the Court Below in limiting the issues to be heard on appeal granted to petitioner in forma pauperis by framing two questions. The wisdom of the Court's action in this regard is full demonstrated by petitioner's attempt in this Court to go back to the judgment of October 29, 1954 from which he failed to perfect his appeal in No. 12,559, by substituting therefor his appeal in No. 13,994 from the order of February 8, 1957. This tactic in the Court Below would have saddled the public with unnecessary costs, as so aptly pointed out by this Court in Adkins v. E. I. DuPont De Nemours & Co., 335 U. S. 331, 69 S. Ct. 85 (1948), as follows:

> *First.* We do not think the court was without power to protect the public from having to pay heavy costs incident to the inclusion of "wholly unnecessary" matters in an *in forma pauperis* appeal. * * *
>
> We know of few more appropriate occasions for use of a court's discretion than one in which a litigant, asking that the public pay costs of his litigation, either carelessly or wilfully and stubbornly endeavors to saddle the public with wholly uncalled-for expense. So here, the court was not required to grant the petitioner's motion if she wrongfully persisted in including in the appeal

record masses of matter plainly irrelevant to the issues raised on appeal. * * *

The Court Below very properly and very effectively handled the matter by restricting the appeal in forma pauperis to those issues which should have been considered, thus eliminating the possibility of petitioner's saddling the public with unjustified costs.

CONCLUSION

The petition is utterly devoid of merit. There is no substantial question involved. The only question actually left in the litigation is the question of the appointment by the District Court of a trustee to judicially sell real property in partial satisfaction of a final judgment. Petitioner commenced perpetrating fraud, promptly on the death of the decedent on April 19, 1945, more than thirteen years ago. Petitioner has dragged out this litigation for seven years. It is time that it was brought to an end.

Respondents respectfully pray this Court to deny the petition for certiorari.

Respectfully submitted,

JOHN J. DONNELLY
1028 Connecticut Avenue
Washington 6, D. C.
Attorney for Respondents